

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

BYRON CHAPMAN,

NO. CIV. S-04-1339 LKK CMK

Plaintiff,

O R D E R

v.

PIER 1 IMPORTS, et al.,

Defendants.

\_\_\_\_\_/

Plaintiff, Byron Chapman, a disabled and wheelchair bound man, sues defendant, Pier 1 Imports store in Vacaville, California, pursuant to the American with Disabilities Act of 1990, 42 U.S.C. §§ 12101 et seq. ("ADA"). He also asserts several state law claims.<sup>1</sup> The matter is before the court on the parties' cross-motions for summary judgment.

////

////

\_\_\_\_\_  
<sup>1</sup> Plaintiff also brings claims pursuant to The Unruh Act (Cal. Civ. Code §§ 51 et seq.), and The Disabled Persons Act (Cal. Civ. Code §§ 54 et seq.). (Other claims raised in the complaint have since been abandoned by plaintiff).

I.

**FACTS<sup>2</sup>**

Plaintiff Byron Chapman ("plaintiff") uses a wheelchair for mobility due to multiple conditions caused by a spinal cord injury. Pl.'s SUF 1. Plaintiff cannot walk unassisted for any distance, and needs a wheelchair to travel in public. Pl.'s SUF 2. On May 22, 2004, plaintiff visited the Pier 1 located at 2070 Harbinson Blvd. in Vacaville, CA to purchase a patio umbrella. He visited the store again on June 1, 2004. Pl.'s SUF 5. During these visits, plaintiff contends that he has encountered a number of barriers that made it difficult for him to fully access the facility. Pl.'s SUF 11. Because of these barriers, plaintiff maintains that he is not able to patronize the Pier 1 as he would like to. Pl.'s SUF 12.

On July 6, 2004, plaintiff filed a complaint, which alleged that he encountered "architectural barriers that denied him full and equal access." Compl. at 4. Plaintiff attached a list of barriers to his complaint, which he claimed were the barriers "known by [him]." Ex. A to Compl. This list of barriers is referred to as the "accessibility survey."

The accessibility survey identified fifteen "barriers." However, since the complaint was filed, plaintiff and defendant jointly stipulated to dismissing all claims relating to the exterior of the building. The remaining barriers identified in the

---

<sup>2</sup> Facts are undisputed unless otherwise noted.

1 complaint are:

2 (1) Improper posting of the ISA signage on the entrance doors  
3 to the store. (Violations identified as 4a & b in the  
4 accessibility survey.)

5 (2) Improper or missing signs designating permanent rooms and  
6 spaces. (6a in the accessibility survey.)

7 (3) Improper sign on emergency exit door. (6b in the  
8 accessibility survey.)

9 (4) Routes of travel to restroom and emergency exits are  
10 blocked. (6c & 7a in the accessibility survey.)

11 (5) No sign for accessible restroom. (8a in the accessibility  
12 survey.)

13 (6) Within the men's restroom, the seat cover dispenser  
14 is located over the back grab bar in the accessible stall. (9a in  
15 the accessibility survey.)

16 (7) Within the men's restroom, the back grab bar is improperly  
17 located in the accessible stall. (10a in the accessibility  
18 survey.)

19 (8) Within the men's restroom, the toilet tissue dispenser is  
20 improperly located in the accessible stall. (11a & b in the  
21 accessibility survey.)

22 (9) There is insufficient floor space around the water closet  
23 within the men's restroom. (12a in the accessibility survey.)

24 (10) A waste receptacle is located in an area that is required  
25 to be clear floor space. (13a in the accessibility survey.)

26 (11) The P-trap leading edge is noncompliant with ADAAG  
regulations.<sup>3</sup> (13b in the accessibility survey.)

(12) The accessible checkout aisles lack the required ISA  
signage. (14a in the accessibility survey.)

(13) Check stands lack required California Building Code  
signage. (14a in the accessibility survey.)

////

---

<sup>3</sup> A p-trap is part of the plumbing that is below a sink.

1 After the complaint was filed, plaintiff's expert, Joe Card,  
2 inspected the store on May 13, 2005 and prepared a report on August  
3 25, 2005. This report identified thirty (30) violations. Some of  
4 these violations pertained to violations raised in the complaint  
5 and other violations were new. Additionally, some of the barriers  
6 listed in the accessibility survey are not addressed at all in  
7 Card's report.

8 On November 14, 2005, defendant filed a motion for summary  
9 judgment, or in the alternative, summary adjudication, on all or  
10 some of the claims raised in the complaint. Plaintiff filed an  
11 opposition and cross-motion for summary judgment in which plaintiff  
12 listed a new and separate list of eleven barriers that were  
13 identified by Joe Card in his August report. See Pl.'s Opp'n. and  
14 Cross-Mot. for Sum. J. at 2:22-321.<sup>4</sup> Several of these newly-  
15 identified barriers related to barriers identified in the  
16 complaint, whereas the other barriers were unrelated to violations  
17 raised in the complaint.<sup>5</sup>

---

18  
19 <sup>4</sup> The new violations identified by Card and listed in the  
20 Oppo/Cross Mot. are: (1) the ISA signage at the entrance door is  
21 improper; (2) entrance door requires 9 pounds of pressure to  
22 operate; (3) the checkout counters lack ISA signage; (4) the height  
23 of the service counter is improper; (5) the store's aisles do not  
24 provide the proper width clearance; (6) the drinking fountain  
25 stream is too low; (7) the signage for the men's restroom is  
26 improper; (8) the men's restroom door improperly requires 12 pounds  
of pressure to operate; (9) in the men's restroom, the mirror is  
at an improper height; (10) in the men's restroom, the water closet  
is improperly centered from the sidewalls; (11) clear floor space  
is not provided for the paper towel dispenser because a trash can  
is located in the area.

<sup>5</sup> Although plaintiff attached the August Card report to his  
cross-motion for summary judgment, only eleven barriers were

## II.

## STANDARDS

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); See also Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Sicor Limited v. Cetus Corp., 51 F.3d 848, 853 (9th Cir. 1995).

Under summary judgment practice, the moving party

[A]llways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" Id. Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at

identified in the actual brief. Plaintiff fails to clarify if he is moving on all thirty violations raised in the Card report, or only the eleven identified in the cross-motion brief. The court concludes that since plaintiff identified only eleven barriers in his actual brief, he is moving only as to those eleven barriers.

1 trial. See id. at 322. "[A] complete failure of proof concerning  
2 an essential element of the nonmoving party's case necessarily  
3 renders all other facts immaterial." Id. In such a circumstance,  
4 summary judgment should be granted, "so long as whatever is before  
5 the district court demonstrates that the standard for entry of  
6 summary judgment, as set forth in Rule 56(c), is satisfied." Id.  
7 at 323.

8 If the moving party meets its initial responsibility, the  
9 burden then shifts to the opposing party to establish that a  
10 genuine issue as to any material fact actually does exist.  
11 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,  
12 586 (1986); See also First Nat'l Bank of Ariz. v. Cities Serv. Co.,  
13 391 U.S. 253, 288-89 (1968); Sicor Limited, 51 F.3d at 853.

14 In attempting to establish the existence of this factual  
15 dispute, the opposing party may not rely upon the denials of its  
16 pleadings, but is required to tender evidence of specific facts in  
17 the form of affidavits, and/or admissible discovery material, in  
18 support of its contention that the dispute exists. Fed. R. Civ.  
19 P. 56(e); Matsushita, 475 U.S. at 586 n.11; See also First Nat'l  
20 Bank, 391 U.S. at 289; Rand v. Rowland, 154 F.3d 952, 954 (9th Cir.  
21 1998). The opposing party must demonstrate that the fact in  
22 contention is material, i.e., a fact that might affect the outcome  
23 of the suit under the governing law, Anderson v. Liberty Lobby,  
24 Inc., 477 U.S. 242, 248 (1986); Owens v. Local No. 169, Assoc. of  
25 Western Pulp and Paper Workers, 971 F.2d 347, 355 (9th Cir. 1992)  
26 (quoting T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,

1 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine,  
2 i.e., the evidence is such that a reasonable jury could return a  
3 verdict for the nonmoving party, Anderson, 477 U.S. 248-49; see  
4 also Cline v. Industrial Maintenance Engineering & Contracting Co.,  
5 200 F.3d 1223, 1228 (9th Cir. 1999).

6 In the endeavor to establish the existence of a factual  
7 dispute, the opposing party need not establish a material issue of  
8 fact conclusively in its favor. It is sufficient that "the claimed  
9 factual dispute be shown to require a jury or judge to , 04-  
10 1993 resolve the parties' differing versions of the truth at trial."  
11 First Nat'l Bank, 391 U.S. at 290; See also T.W. Elec. Serv., 809  
12 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce  
13 the pleadings and to assess the proof in order to see whether there  
14 is a genuine need for trial.'" Matsushita, 475 U.S. at 587  
15 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963  
16 amendments); see also International Union of Bricklayers & Allied  
17 Craftsman Local Union No. 20 v. Martin Jaska, Inc., 752 F.2d 1401,  
18 1405 (9th Cir. 1985).

19 In resolving the summary judgment motion, the court examines  
20 the pleadings, depositions, answers to interrogatories, and  
21 admissions on file, together with the affidavits, if any. Rule  
22 56(c); See also In re Citric Acid Litigation, 191 F.3d 1090, 1093  
23 (9th Cir. 1999). The evidence of the opposing party is to be  
24 believed, see Anderson, 477 U.S. at 255, and all reasonable  
25 inferences that may be drawn from the facts placed before the court  
26 must be drawn in favor of the opposing party, see Matsushita, 475

1 U.S. at 587 (citing United States v. Diebold, Inc., 369 U.S. 654,  
 2 655 (1962) (per curium)). Nevertheless, inferences are not drawn  
 3 out of the air, and it is the opposing party's obligation to  
 4 produce a factual predicate from which the inference may be drawn.  
 5 See Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45  
 6 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902 (9th Cir. 1987).

7 Finally, to demonstrate a genuine issue, the opposing party  
 8 "must do more than simply show that there is some metaphysical  
 9 doubt as to the material facts. . . . Where the record taken as a  
 10 whole could not lead a rational trier of fact to find for the  
 11 nonmoving party, there is no 'genuine issue for trial.'" Matsushita,  
 12 475 U.S. at 587 (citation omitted).

### 13 III.

#### 14 PRELIMINARY QUESTIONS

15 Pending before the court are cross-motions for partial summary  
 16 judgment filed by both parties. Defendant moves for summary  
 17 judgment on the grounds that plaintiff lacks standing and that  
 18 plaintiff's claims are either not barriers as a matter of law, or  
 19 have been remedied. See Def.'s Mot. for Sum. J. at 2.<sup>6</sup> Plaintiff  
 20 cross-moves on the grounds that there remain barriers which were  
 21 identified by plaintiff's expert, and which relate to plaintiff's  
 22 ////

---

23  
 24 <sup>6</sup> Although defendant appears to move for summary judgment as  
 25 to all claims raised in the complaint, defendant and plaintiff only  
 26 brief the ADA and Unruh claims. The court will only adjudicate  
 those claims which are clearly being moved on. For that reason,  
 the court declines to adjudicate the related state law claims which  
 have not been briefed by either party.



1 disability. Pl.'s Opp'n and Cross-Mot. at 5.<sup>7</sup> Plaintiff moves for  
2 summary judgment on his ADA and Unruh Act claims.<sup>8</sup>

3 Before addressing the merits of the case, however, I address  
4 several threshold issues.

5 **A. WHICH CLAIMS ARE ACTIONABLE?**

6 Before resolving the motions, the court must first  
7 determine which architectural barriers are properly before the  
8 court. Plaintiff asserts claims based upon the barriers alleged  
9 in his complaint and on those identified in the August Card report.  
10 Defendant argues that plaintiff only has standing to bring suit  
11 with respect to the barriers he personally encountered and that  
12 plaintiff lacks standing as to the violations discovered by Card.

13 The court recently had the opportunity to address this exact  
14 issue in two prior cases, Eiden v. Home Depot, No. CIV. S-04-977  
15 LKK/CMK (E.D. Cal. 2004) and Wilson v. Pier 1 Imports, 413 F.Supp.2d  
16 1130 (E.D. Cal. 2006). As in Wilson and Eiden, defendant in the  
17 case-at-bar relies on a standard offered in White/Martinez that  
18 this court believes is "unduly restrictive," and thus, the court  
19 cannot adhere to it. No purpose would be served by repeating the  
20 analysis articulated in Wilson and Eiden. With respect to the Card  
21

---

22 <sup>7</sup> Plaintiff has filed one brief which contains his motion for  
23 summary judgment as well as his opposition brief to defendant's  
motion for summary judgment.

24 <sup>8</sup> As explained in note 6, the court will only adjudicate  
25 those claims that are briefed by the parties. Plaintiff is silent  
26 as to his claim under the Disabled Persons Act. The court  
concludes, therefore, that plaintiff is only moving on his Unruh  
and ADA claims.

1 report and the accessibility survey, nothing in the ADA requires  
2 plaintiff to have personally encountered all barriers in order to  
3 seek an injunction to remove those barriers. See Eiden v. Home  
4 Depot, No. CIV. S-04-977 LKK/CMK (E.D. Cal. 2004); Wilson v. Pier  
5 1 Imports, 413 F.Supp.2d 1130 (E.D. Cal. 2006).

6 Nor is plaintiff's suit limited to the barriers that he  
7 alleged in his complaint. As this court previously explained,  
8 "[o]nce plaintiff either encountered discrimination or learned of  
9 the alleged violations through expert findings or personal  
10 observation, he had 'actual notice' that defendant did not intend  
11 to comply with the ADA." See Wilson, 413 F.Supp.2d at 1134. As  
12 the court further noted,

13 "the injury-in-fact requirement of Article III standing  
14 is easily satisfied by liberally construing it in this  
15 context. All that is required is to recognize that the  
16 injury suffered relative to later-discovered barriers is  
the threat of being subjected to discrimination suffered  
by virtue of the existence of barriers, whether or not  
initially encountered."

17 Id.

18 Having explained that, as a general matter, plaintiff is not  
19 bound by the specific ADA claims asserted in his complaint under  
20 Constitutional standing principles, the court addresses defendant's  
21 argument that plaintiff should not be permitted to incorporate new  
22 factual allegations that are not contained within the complaint.  
23 Def.'s Reply at 9:16-17. Indeed, although plaintiff's complaint  
24 need only state a "short and plain statement of the claim showing  
25 that the pleader is entitled to relief," see Fed. R. Civ. P.  
26 8(a)(2), plaintiff must still provide "fair notice" for specific

1 claims not asserted in his complaint.

2 The court finds that, under the circumstances, the barriers  
3 alleged in the Card report are actionable. The Card report was  
4 served on defendant on August 26, 2005, two months before the close  
5 of discovery. Defendant became aware of the Card report at that  
6 time.

7 As with the issue of standing, the court recently addressed  
8 the issue of notice in Eiden. Rather than repeat the analysis  
9 here, the court adopts by reference the notice analysis as set  
10 forth in Eiden. Where, as here, plaintiff discovered new alleged  
11 violations during the discovery period that were not pled in the  
12 complaint, but disclosed to defendant in sufficient time to permit  
13 defendant to address them in discovery and by way of law and  
14 motion, the court concludes plaintiff is not precluded from raising  
15 these allegations on a motion for summary judgment or at trial.<sup>9</sup>

16 For the reasons explained above, the court holds that the  
17 claims asserted in the accessibility survey and Card report are  
18 actionable and shall be adjudicated by this court. The court now  
19 turns to Unruh Civil Rights Act and ADA violations alleged by  
20 plaintiff.

21 **B. THE UNRUH ACT**

22 Plaintiff seeks summary judgment pursuant to the Unruh Act  
23 because his claim is predicated upon defendant's violation of the  
24

---

25 <sup>9</sup> That is not to say that amendment of the complaint is not  
26 the better practice - clearly it is.

1 ADA. Pl.'s Cross-Mot. and Opp'n at 6.<sup>10</sup> He asserts that "a  
2 violation of his rights under the ADA is a *per se* violation of his  
3 rights under the Unruh Act." *Id.* (italics in original). Defendant  
4 maintains that the Unruh claim should be dismissed because it is  
5 based solely on the alleged violations of the ADA and plaintiff  
6 cannot establish any ADAAG violations. Def.'s Reply at 15.

7 Alternatively, defendant argues that the court should decline to  
8 exercise jurisdiction over the Unruh claim. Def.'s Reply at 16.

9 Because there remain disputed issues as to a number of the ADA  
10 claims, there remains a live controversy as to the federal claims.  
11 Thus, the court may still exercise supplemental jurisdiction over  
12 plaintiff's state law claims. I now turn to the provisions of the  
13 Unruh Act.

14 The Unruh Civil Rights Act, codified in California Civil Code  
15 § 51, provides that "[a]ll persons . . . are entitled to full and  
16 equal accommodations, advantages, facilities, privileges, or  
17 services in all business establishments of every kind whatsoever."  
18 Cal. Civ. Code § 51(b). The purpose of the Unruh Act "is to compel  
19 a recognition of the equality of citizens in the right to the  
20 peculiar service offered" by the entities covered by the acts.  
21 Marina Point, Ltd. v. Wolfson, 30 Cal.3d 721, 737 (1982)(quotation  
22 omitted); see also Strother v. Southern California Permanente  
23 Medical Group, 79 F.3d 859 (9th Cir. 1996).

---

24  
25 <sup>10</sup> Plaintiff pleads in his complaint that his Unruh Act claim  
26 is predicated upon the ADA claim. See ¶ 63 of Compl. ("The Unruh  
Act also specifically incorporates (by reference) an individual's  
rights under the ADA.").

1 Prior to 1992, to prove a claim under the Unruh Act plaintiff  
2 was required to demonstrate that the facility was in violation of  
3 Title 24 and that the discrimination he experienced was  
4 intentional. See Harris v. Capital Growth Investors XIV, 52 Cal.3d  
5 1142, 1175 (1991)("[W]e hold that a plaintiff seeking to establish  
6 a case under the Unruh Act must plead and prove intentional  
7 discrimination in public accommodations in violation of the terms  
8 of the Act"); Lentini v. California Center for the Arts, 970 F.3d  
9 837, 847 (9th Cir. 2004).

10 To effectuate its long-stated policy of ridding the state of  
11 discrimination, see Warfield v. Peninsula Golf & Country Club, 10  
12 Cal.4th 594 (1995), the California legislature amended the Unruh  
13 Act in 1992 to broaden the scope of its protection. As amended,  
14 § 51 provides that "[a] violation of the right of any individual  
15 under the Americans with Disabilities Act of 1990 . . . shall also  
16 constitute a violation of this section." Cal. Civ. Code § 51(f).

17 It is pursuant to this subsection that plaintiff seeks to  
18 recover. See Pl.'s Compl. at 11. Plaintiff maintains that the  
19 violations complained of in his complaint and in the Card report  
20 violated both the ADA and California law. Indeed, both Card's  
21 report and the accessibility survey note how each alleged barrier  
22 violates the ADAAG and the CBC.

23 While, as a general matter, a plaintiff may rely on both the  
24 ADAAG and CBC when pursuing an Unruh claim, the question is whether  
25 he may do so where his Unruh claim is based solely on purported  
26 violations of the ADA. This issue raises two different questions:

1 Is plaintiff's Unruh claim proceeding only on the amendment  
2 allowing recovery under state law for violation of the federal  
3 statute? If so, may plaintiff rely on the CBC in doing so?

4 As in Eiden, the court concludes that nowhere in plaintiff's  
5 filings is there any suggestion of intentional discrimination.  
6 Accordingly, the only legal theory available to plaintiff on his  
7 Unruh claim is that architectural barriers at Pier 1 violate the  
8 ADA. See Eiden, No. CIV. S-04-977 LKK/CMK (E.D. Cal. 2006). It  
9 does not follow, however, that where relief is barred under the  
10 ADA, relief is also barred under the Unruh Act.

11 Again, as explained previously in Eiden, the state  
12 legislature, unlike Congress, has provided that an individual may  
13 recover damages for a violation of the Unruh Act. As in Eiden, I  
14 conclude that plaintiff may recover under the Unruh Act, even  
15 absent relief under the ADA. The second question seems equally  
16 straight-forward. See id.

17 **C. The CBC and the ADA**

18 At various places throughout plaintiff's brief and the Card  
19 report, reliance is placed on the California Building Code to  
20 assert violations of the ADA. As the parties note, it is clear  
21 that the federal statute does not preempt state law where the state  
22 law provides "greater or equal protection." 42 U.S.C. § 12201(b).  
23 The question here, however, is not whether state law is more  
24 protective, but whether a violation of state regulations  
25 establishes a barrier for purposes of the ADA.

26 ////

1 This exact issue was also addressed in Eiden. Rather than  
2 repeat the analysis, the court adopts by reference the analysis  
3 articulated in Eiden with respect to the ADAAG and the CBC. As in  
4 Eiden, I conclude that compliance with the ADAAG, and not another  
5 standard, constitutes compliance with the ADA requirements for new  
6 construction.<sup>11</sup>

7 For all of the reasons set forth above, the court concludes  
8 that the ADAAG constitutes the exclusive standards under Title III  
9 of the ADA. I now turn to plaintiff's ADA claims, since his Unruh  
10 Act claims turn on ADA liability.

#### 11 IV.

#### 12 THE MERITS

13 Title III of the ADA prohibits discrimination against  
14 individuals on the basis of disabilities in the full and equal  
15 enjoyment of the goods, services, facilities, privileges,  
16 advantages or accommodations of any place of public accommodation.  
17 See 42 U.S.C. § 12182(a). Title III defines "discrimination" as,  
18 among other things, a failure to remove "barriers . . . where such  
19 removal is readily achievable." 42 U.S.C. § 12182(b)(2)(A)(iv);  
20 Pickern v. Holiday Quality Foods Inc., 293 F.3d 1133, 1135 (9th  
21

---

22 <sup>11</sup> Finally, the court notes that because Congress directed  
23 that the Department of Justice, in conjunction with the  
24 Architectural and Transportation Barriers Compliance Board ("Access  
25 Board"), issue the ADAAG, and that these standards constitute  
26 binding regulation, the court is not authorized to evaluate Title  
III disability discrimination claims under any other standard, and  
to determine what engineering or architectural modifications are  
necessary, or whether such modifications would be feasible and  
desirable.

1 Cir. 2002). Plaintiff avers that defendant discriminated against  
2 him when it failed to remove certain architectural barriers at the  
3 Pier 1 location at issue in this litigation.

4 Under Title III of the ADA, a plaintiff must prove that (1)  
5 he has a disability, (2) defendant's facility is a place of public  
6 accommodation, (3) and plaintiff was denied full and equal  
7 treatment because of his disability. To succeed on an ADA claim  
8 of discrimination on account of an architectural barrier, the  
9 plaintiff must also prove that (1) the existing facility at the  
10 defendant's place of business presents an architectural barrier  
11 prohibited under the ADA, and (2) the removal of the barrier is  
12 readily achievable. See 42 U.S.C. § 12182(b)(2)(A)(iv); see also  
13 Pascuiti v. New York Yankees, No. 98 CIV. 8186 (SAS), 1999 WL  
14 1102748, at \* 5 (S.D.N.Y. Dec.6, 1999) (plaintiff bears the initial  
15 burden of proving that barrier removal is readily achievable). If  
16 plaintiff satisfies his burdens, the burden shifts to the defendant  
17 to show that removal of the barriers is not readily achievable.

18 It is undisputed that Pier 1 Imports is a place of public  
19 accommodation and that plaintiff is disabled. Plaintiff thus meets  
20 the first two elements of an ADA prima facie case. What remains  
21 in dispute is whether plaintiff was discriminated against on  
22 account of his disability based on an architectural barrier.

23 **A. ARCHITECTURAL BARRIERS AND STANDARDS GOVERNING NEW**  
24 **CONSTRUCTION**

25 Plaintiff contends that defendant violated the ADA by failing  
26 to abide by the Department of Justice's Regulations implementing



1 the ADA's public accommodation provisions and the corresponding ADA  
2 Accessibility Guidelines ("ADAAG"). These regulations are divided  
3 into three categories. The first category requires that newly-  
4 constructed public accommodations must comply with specific  
5 accessibility requirements set forth in the ADAAG. See 28 C.F.R.  
6 Pt. 36.401; 28 C.F.R. Pt. 36.406. The second category concerns the  
7 accessibility requirements imposed on public accommodations altered  
8 after January 26, 1992. See id. The third category requires the  
9 removal of architectural barriers in preexisting public  
10 accommodations (those designed and constructed for occupancy before  
11 January 26, 1993). See 28 C.F.R. Pt. 36.304. Under the ADA's  
12 continuing barrier removal obligation, it is discriminatory for  
13 owners, operators, lessors or lessees to fail to remove  
14 architectural barriers that deny disabled persons the goods and  
15 services offered to the general public. See Hubbard v. Twin Oaks  
16 Health and Rehabilitation Center, 408 F.Supp.2d 923, 930 (E.D. Cal.  
17 2004)(citing Parr v. L & L Drive-Inn Restaurant, 96 F.Supp.2d 1065,  
18 1086 (D. Haw. 2000)).

19 For purposes of the ADA, the Pier 1 facility at issue  
20 falls within the first category described, as the building was  
21 constructed in 2002. The ADA requires that newly-constructed  
22 facilities be "readily accessible and usable by individuals with  
23 disabilities." See 42 U.S.C. § 12183(a)(1). This command to build  
24 accessible facilities is excepted only if meeting the requirements

25 ////

26 ////

1 of the Act would be "structurally impracticable." Id.<sup>12</sup>; See  
2 also Long v. Coast Resorts, Inc., 267 F.3d 918, 923 (9th Cir. 2001)  
3 ("We need not decide whether the ADA forecloses the possibility  
4 that a court might exercise its equitable discretion in fashioning  
5 relief for violations of § 1283(a) . . . because there is no room  
6 for discretion even if it exists")(citation omitted)).

7 Below, the court addresses the ADA violations alleged in the  
8 complaint, which plaintiff moves on in his summary judgment motion,  
9 as well as the violations identified by Joe Card in the expert  
10 report.

11 **B. BARRIERS RAISED IN COMPLAINT**

12 Defendant moves as to all the barriers alleged in plaintiff's  
13 complaint. The court quickly disposes of ten of the thirteen  
14 barriers raised in the complaint.<sup>13</sup>

15 With respect to these ten barriers, defendant's motion for  
16 summary judgment must be granted. First, plaintiff fails to supply

---

17 <sup>12</sup> See also 28 C.F.R. Pt. 36.401(c) (structural  
18 impracticability means "those rare circumstances where the unique  
19 characteristics of the terrain prevent the incorporation of  
accessibility features").

20 <sup>13</sup> The following barriers all raise similar issues and so the  
21 court disposes of these barriers first and as a group: Exit door  
22 signage missing (barrier 6b in the accessibility survey); no  
23 directional signage for accessible restrooms (barrier 8a); within  
24 the men's restroom, the seat cover dispenser is improperly located  
25 (barrier 9a); within the men's restroom, the back grab bar is  
26 improperly located in the accessible stall (barrier 10a); within  
the men's restroom, the toilet tissue dispenser is improperly  
located (11a & b); there is inadequate clear floor space in the  
men's restroom (barrier 12a); within the men's restroom, the P-trap  
leading edge is noncompliant (barrier 13b); accessible checkout  
aisles lack ISA signage (barrier 14a); and check stands lack CBC  
signage (barrier 15a).

1 any legal basis for several of the alleged barriers.<sup>14</sup> Often, the  
2 ADAAG section cited to by plaintiff is not applicable (because it  
3 does not address that specific barrier) or plaintiff does not  
4 explain how the alleged barrier actually violates the ADAAG. The  
5 court will not search for which section of the ADAAG, if any, is  
6 applicable to the alleged barriers raised by plaintiff.

7 Second, even when plaintiff has cited to the proper ADAAG  
8 standard, defendant has established that there are no violations  
9 with respect to these alleged barriers. Specifically, defendant  
10 explains that plaintiff's own expert, Joe Card, did not address any  
11 of these alleged barriers in his August report. This is  
12 significant for two reasons. One, Card testified that he was aware  
13 of no other additional barriers that were not listed in his report.  
14 Therefore, he did not identify any of these barriers (which were  
15 raised in the complaint) as "violations". Two, Card inspected the  
16 store over a year after the accessibility survey was completed and  
17 during that year, the store may have remedied the violation. In  
18 short, defendant put forth facts that these ten alleged violations  
19 do not, in fact, exist. Plaintiff, in turn, has failed to tender  
20 any evidence to suggest that a factual dispute remains as to these  
21 alleged violations.

---

22  
23 <sup>14</sup> Specifically, plaintiff fails to cite a relevant ADAAG  
24 standard with respect to the following alleged violations: Exit  
25 door signage missing (barrier 6b in the accessibility survey); no  
26 directional signage for accessible restrooms (barrier 8a); within  
the men's restroom, the seat cover dispenser is located over the  
back grab bar (barrier 9a); the back grab bar is improperly located  
(10a); accessible checkout aisles lack ISA signage (barrier 14a);  
and check stands lack CBC signage (barrier 15a).

1 Finally, plaintiff fails to mention, much less discuss, any  
2 of these ten alleged violations in his opposition, cross-motion and  
3 reply brief.

4 Given plaintiff's lack of diligence in assisting the court  
5 with the adjudication of each of these ten alleged barrier, it is  
6 worth noting that "[j]udges are not like pigs, hunting for  
7 truffles buried in' the record." Albrechtsen v. Board of Regents  
8 of University of Wisconsin System, 309 F.3d 433, 436 (7th Cir.  
9 2002)(quoting United States v. Dunkel, 927 F.2d 955, 956 (7th Cir.  
10 1991)). For this reason, defendant's motion with respect to all  
11 ten of these barriers is GRANTED.

12 The court next addresses barriers that require more  
13 discussion.

14 1. Improper Posting of the ISA Signage on the Entrance  
15 Doors to the Store<sup>15</sup>

16 Plaintiff alleged in the accessibility survey that there was  
17 no ISA sign mounted on the right side of the entrance door (it was  
18 on the left) and that the ISA symbol was not mounted at the  
19 required height of 60 inches.<sup>16</sup> However, by the time Joe Card

---

20  
21 <sup>15</sup> This alleged barrier was identified as "4a & b" in the  
22 accessibility survey. This alleged barrier was raised in both the  
complaint and in plaintiff's cross-motion for summary judgment.

23 <sup>16</sup> Section 4.30.6 of ADAAG specifies that, "where permanent  
24 identification is provided for rooms and spaces, signs shall be  
25 installed on the wall adjacent to the latch side of the door  
26 . . . the mounting height "shall be 60 inches (1525 mm) above the  
finish floor to the centerline of the sign. Mounting location for  
such signage shall be so that a person may approach within 3 in (76  
mm) of signage without encountering protruding objects or standing  
within the swing of a door."

1 surveyed the building, an ISA sign had been placed to the right  
2 side of the door. See Card Report at 1. Even so, plaintiff  
3 maintains in his cross-motion that the sign's height remains in  
4 violation of the ADAAG standards. Pl.'s Opp'n. at 2. Defendant  
5 moves for summary judgment on the grounds that as a matter of law,  
6 there is no violation of ADAAG as the ADAAG does not discuss entry  
7 door signs.

8 The ADAAG standards clearly requires that if there are ISA  
9 signs, they must be posted 60 inches from the ground. Here,  
10 plaintiff's expert asserts that there is sign and it is posted 63  
11 1/2 inches from the ground. Since defendant produces no factual  
12 evidence to dispute plaintiff's measurements, summary judgment is  
13 GRANTED for plaintiff and DENIED as to defendant.

14 **2. Improper or Missing Signs Designating Permanent Rooms**  
15 **and Spaces**<sup>17</sup>

16 In the accessibility survey, plaintiff maintains that "signs  
17 designating permanent rooms and spaces (men's and women's rooms;  
18 room numbers; exit signs) must have raised and brailled letters;  
19 and must comply with finish and contrast standards." Accessibility  
20 Survey at 1.

21 It is undisputed that plaintiff is not visually impaired and  
22 thus, he has not suffered an "injury in fact" due to the absence  
23 of braille. See Access Now, Inc. v. South Florida Stadium Corp.,  
24 161 F.Supp.2d 1357, 1364 (S.D. Fla. 2001) ("To the extent that  
25

---

26 <sup>17</sup> Violation identified as 6a in the accessibility survey.

1 Plaintiffs complain about violations that would discriminate  
2 against blind or deaf persons, or any disabilities other than that  
3 suffered by Plaintiff Resnick, they lack standing to pursue such  
4 claims."); Martinez v. Longs Drug Stores, Inc., 2005 WL 2072013,  
5 \*2 (E.D. Cal. 2005).

6 Standing is limited to claims for which the plaintiff is  
7 "among the injured." Lujan v. Defenders of Wildlife, 504 U.S. 555,  
8 560-561 (1992). Allowing plaintiff to sue on behalf of all the  
9 disabled would extend beyond the limitations of Article III because  
10 plaintiff cannot ultimately prove "injury in fact" as to a barrier  
11 which does not affect him. A plaintiff must have a "personal stake  
12 in the outcome" sufficient to "assure that concrete adverseness  
13 which sharpens the presentation of issues upon which the court so  
14 largely depends for illumination of difficult . . . questions."  
15 Baker v. Carr, 369 U.S. 186, 204 (1962). Accordingly, the court  
16 holds that this claim must be DISMISSED due to lack of standing.<sup>18</sup>

17 **3. Routes of Travel to Restroom and Emergency Exits are**  
18 **Blocked**<sup>19</sup>

19 Plaintiff claims that there was a ladder obstructing the  
20 emergency exit door and merchandise obstructed an accessible route  
21 of travel to the restroom. Defendant maintains that, "the ladder  
22 and merchandise allegedly located in the store's circulation aisles  
23

---

24 <sup>18</sup> The court also notes that plaintiff did not address this  
25 barrier in his opposition and cross-motion for summary judgment.

26 <sup>19</sup> Violations identified as 6c & 7a in the accessibility  
survey.

1 constituted temporary obstructions that are not barriers as a  
2 matter of law." Def.'s Mot. at 14. Moreover, plaintiff's own  
3 expert, Joe Card, testified that most of the alleged obstructions  
4 in the store's aisles were temporary obstructions.

5 Neither the ADA nor the ADAAG addresses movable objects. The  
6 statute's implementing regulations explicitly require, however,  
7 that "[p]ublic accommodations are required to maintain those  
8 features of their facilities that need to be readily accessible to  
9 people with disabilities." See 28 C.F.R. Pt. 36.211(a). The  
10 regulations also state that "[i]solated or temporary interruptions  
11 in access due to maintenance or repairs are not prohibited." See  
12 28 C.F.R. Pt. 36.211(b). The regulations appear to suggest that  
13 although defendant is required to maintain ready accessibility, it  
14 would not be liable for "isolated" or movable objects which  
15 temporarily restrict access where the barrier is caused by  
16 maintenance or repair.

17 The Justice Department has also determined that regular use  
18 of an accessible route for storage of supplies would violate Title  
19 III, but an isolated instance of placement of an object in an  
20 accessible route is not a violation if the object is promptly  
21 removed. See United States Department of Justice, Civil Rights  
22 Division, The Americans with Disabilities Act: Title III Technical  
23 Assistance Manual § III-3.7000 (1993); see also Bragdon v. Abbott,  
24 524 U.S. 624, 646 (1998) (citing Technical Assistance Manual and  
25 noting that Justice Department's views entitled to deference).

26 ////

1 Two cases which have addressed this issue, a Colorado Court  
2 of Appeals case and an unpublished New Hampshire District Court  
3 case, have both held that isolated failures to maintain access  
4 routes or parking spaces, without more, are not covered by the ADA.  
5 See Tanner v. Wal-Mart Stores, Inc., 2000 DNH 34 (D. N.H. 2000)  
6 (isolated incident of failure to remove shopping carts does not  
7 constitute a Title III violation); Pack v. Arkansas Valley  
8 Correctional Facility, 849 P.2d 34, 38 (Colo. Ct. App. 1995)  
9 (isolated instance of negligence regarding failure to remove ice  
10 and snow from handicapped parking zone not an ADA violation).

11 Here, defendant asserts that any obstruction was only  
12 temporary in nature. Plaintiff fails to tender any evidence to the  
13 contrary and fails to address this alleged barrier in either his  
14 cross-motion for summary judgment or his reply brief.

15 For these reasons, defendant's motion for summary judgment as  
16 to this barrier is GRANTED.

17 **4. A Waste Receptacle is Located in an Area that is**  
18 **Required to be Clear Floor Space**<sup>20</sup>

19 Plaintiff claims that within the men's restroom, a waste  
20 receptacle was placed in the required clear floor space and was a  
21 barrier to people in wheelchairs attempting to reach the paper  
22 towel dispenser. See Accessibility Survey at 3. This alleged  
23 violation is also raised in plaintiff's cross motion for summary  
24 judgment. See Pl.'s Cross-Mot. at 3. Plaintiff's expert also

---

25  
26 <sup>20</sup> Violation identified as 13a in the accessibility survey.



1 asserts in his report that a trash can is blocking the clear space  
2 below the paper towel dispenser. See Card Report at "Mens Page  
3 # 07."

4 Defendant argues that the trash basket is a temporary obstacle  
5 that can be moved and thus does not constitute a barrier. Def.'s  
6 Mot. at 18. This argument is unavailing. Plaintiff has put forth  
7 factual allegations that the trash basket is an on-going barrier,  
8 and defendant has failed to tender any evidence that the trash  
9 basket is in fact a temporary object that does not violate the  
10 ADAAG. For this reason and with respect to this barrier,  
11 defendant's motion is DENIED and plaintiff's motion is GRANTED.

12 **C. ALLEGED BARRIERS RAISED IN PLAINTIFF'S CROSS-MOTION**  
13 **FOR SUMMARY JUDGMENT**

14 Plaintiff moves for summary judgment with respect to eleven  
15 barriers which were identified in the August 2005 Card report.<sup>21</sup>  
16 The court addresses each in turn.

17 ////

18 ////

19 ////

20 ////

21 ////

22 ////

---

23  
24 <sup>21</sup> The court has already disposed of two of the eleven  
25 barriers as they were raised in the initial complaint.  
26 Specifically, the court already addressed the alleged violation  
regarding the sign by the entrance door and the trash can in the  
men's restroom.

1        **1.    Violations involving "dimensional tolerances"**

2        Three of the violations moved on by plaintiff involve very  
3 small deviations in measurement. Specifically, plaintiff alleges  
4 the following violations:

5        (I) The lowered section of the service counter is 34-3/16  
6 inches from the floor, citing ADAAG 4.32.4. <sup>22</sup>

7        (ii) The men's restroom mirror is mounted with the bottom edge  
8 at 40 3/4 inches above the floor, citing to ADAAG § 4.19.6. <sup>23</sup>

9        (iii) In the men's restroom, the water closet is centered at  
10 19 inches from the sidewall, citing to ADAAG 4.17.3. <sup>24</sup>

11       Defendant maintains that all three of these alleged violations  
12 involve very small deviations from the measurements required by  
13 ADAAG. Defendant argues that the differences (3/16 of an inch with  
14 respect to the service counter, 3/4 of an inch with respect to the  
15 mirror and 1 inch with respect to the floor space) are within  
16 dimensional tolerances, as provided for by ADAAG section 3.2.

17       Section 3.2 of ADAAG states that "[a]ll dimensions are subject  
18 to conventional building industry tolerances for field conditions."

19       ////

20       ////

---

21       <sup>22</sup> Section 4.32.4 of ADAAG states that the "tops of  
22 accessible tables and counters shall be from 28 in to 34 in . . .  
23 above the finish floor or ground."

24       <sup>23</sup> Section 4.19.6 states that "[m]irrors shall be mounted  
25 with the bottom edge of the reflecting surface no higher than 40  
26 in (1015 mm) above the finish floor."

26       <sup>24</sup> Section 4.17.3 (Fig. 30(a)) states that "the centerline of  
the water closet shall be 18 inches (455 mm) from the side wall."

1 Although defendant attempts to catagorize these small differences  
2 in measurements as being within "dimensional tolerance," defendant  
3 has failed to provide evidence regarding applicable  
4 conventional building industry tolerances. See United States v.  
5 AMC Entertainment, Inc., 245 F.Supp.2d 1094, 1100 (C.D. Cal. 2003).  
6 "[M]any standards set forth in the ADAAG speak in terms of minimums  
7 that must be provided," and defendant's argument suggests that the  
8 court should "shave half an inch or an inch off these articulated  
9 minimums." Id. See also Independent Living Resources v. Oregon  
10 Arena Corp., 1 F.Supp.2d 1124, 1135 (D. Or. 1998) ("defendant has  
11 not furnished this court with evidence of what those conventional  
12 tolerances are for the particular construction work in question.").  
13 Since defendant has failed to show that there is a remaining  
14 dispute as to these barriers, plaintiff's motion for summary  
15 judgment as to these three barriers is GRANTED.

16 **2. The Entrance Door Requires 9 pounds of Pressure**  
17 **to Operate, which Violates CBC § 1133B.2.5 (1998 version)**

18 Plaintiff only cites to the California Building Code in  
19 support of this alleged barrier. Plaintiff fails to cite to any  
20 section of ADAAG. For the reasons discussed in section III C of  
21 this order, the court need not address the CBC violations. For  
22 this reason, as to this barrier, defendant's motion is GRANTED.

23 ////

24 ////

25 ////

26 ////

1           **3. The Counter Lacks International Symbol of Accessibility**  
2           **Signage to Direct Disabled Customers to the Lowered**  
3           **Section of the Counter (the Lowered Section of the**  
4           **Counter is Not Visible from the Front of the Store),**  
5           **which Violates ADAAG § 4.30.7**

6           Plaintiff alleges that the counter lacks ISA signage to direct  
7 disabled customers to the lowered section of the checkout counter  
8 (citing ADAAG 4.30.7) Defendant maintains that there is no  
9 requirement for this type of signage.

10          Section 4.30.7 of the ADAAG states that "[f]acilities and  
11 elements required to be identified as accessible by 4.1 shall use  
12 the international symbol of accessibility." Section 4.1 states  
13 that:

14           Elements and spaces of accessible facilities which shall be  
15 identified by the International Symbol of Accessibility and  
16 which shall comply with 4.30.7 are:

- 17           (a) Parking spaces designated as reserved for individuals  
18           with disabilities;  
19           (b) Accessible passenger loading zones;  
20           (c) Accessible entrances when not all are accessible  
21           (inaccessible entrances shall have directional signage to  
22           indicate the route to the nearest accessible entrance);  
23           (d) Accessible toilet and bathing facilities when not all  
24           are accessible.

25          ADAAG, Sec. 4.2.1(7). Defendant maintains that read together,  
26 these provisions establish that ISA signs are only required for  
these specific locations. Def.'s Opp'n. at 15. Plaintiff, on the  
other hand, argues that this list is not exhaustive and "common  
sense" dictates that there should be a sign placed over the  
counter. See Pl.'s Reply at 13. The court is bound by law, which,  
for better or worse, does not always comport with common sense.

////

1 The ADAAG standards do not mandate that a sign be placed over an  
2 accessible checkout counter, and thus the court cannot expect  
3 defendant to comply with a standard that does not exist. For this  
4 reason, plaintiff's motion for summary judgment as to this barrier  
5 is DENIED.

6 **4. The Store's Aisles Do Not Provide the Proper Width**  
7 **Clearance of 44 Inches**

8 Plaintiff asserts that the "the store's aisles do not provide  
9 the proper width clearance of 44 inches, the aisles widths are 39  
10 1/2, 38 1/2, 41, 42 1/2, 40 1/2, 41 1/2, 27 1/4, 36, 38 inches,  
11 which violates ADAAG 4.3.3." Pl. Opp'n. at 3.

12 Plaintiff misreads the ADAAG section. Section 4.3.3 of ADAAG  
13 specifically states that "the minimum clear width of an accessible  
14 route shall be 36 in (915 mm) except at doors." That said,  
15 plaintiff asserts that one of the aisles measures only 27 1/4  
16 inches, which does not comply with the ADAAG requirement.  
17 Defendants fail to present any evidence that disputes this fact.  
18 Given that at least one aisle is non-compliant with the ADAAG,  
19 plaintiff's motion for summary judgment is GRANTED.

20 **5. The Drinking Fountain Stream is only 2½ Inches High**

21 Plaintiff alleges that the drinking fountain stream is only  
22 2 1/2 inches high, citing ADAAG section 4.15.3. Section 4.15.3  
23 provides that the "spout shall provide a flow of water at least 4  
24 in (100 mm) high so as to allow the insertion of a cup or glass  
25 under the flow of water."

26 /////

1 Defendant argues that plaintiff's expert made unreliable  
2 measurement and that the expert did not clarify which fountain he  
3 purportedly measured. This argument is unavailing.

4 Plaintiff puts forth evidence in the form of expert testimony  
5 that the water stream is lower than the ADAAG requirement.  
6 Defendant fails to present any evidence that disputes this fact.  
7 In short, defendant does not present any evidence which would  
8 establish that a disputed fact remains with respect to the height  
9 of the water stream. For this reason, the court GRANTS plaintiff's  
10 motion with respect to this barrier.

11 **6. On the Men's Restroom Wall, the Pictogram is only 4**  
12 **Inches High**

13 Plaintiff alleges that the men's restroom wall signage has a  
14 pictogram that is only 4 inches high, citing ADAAG 4.30.4. Section  
15 4.30.4 states that "the border dimension of the pictogram shall be  
16 6 in (152 mm) minimum in height." Defendant's expert, however,  
17 measured the boarder at 8 inches. Given that there is a factual  
18 dispute, summary judgment is inapplicable and therefore,  
19 plaintiff's motion as to this barrier is DENIED.

20 **7. The Men's Restroom Door Requires 12 Pounds of Pressure**  
21 **to Operate**

22 Plaintiff alleges that the men's restroom door requires 12  
23 pounds to operate, which violates ADAAG § 4.13.11. Section 4.13.11  
24 states that the maximum force for pushing or pulling open an  
25 interior door is five pounds. Defendant contends that plaintiff's  
26 measurements are inaccurate and that defendant's expert measured

1 the restroom doors at "completely compliant pressures." Def.'s  
2 Opp'n. at 17. It is clear that a genuine issue of material fact  
3 remains and plaintiff's motion as to this barrier must therefore  
4 be DENIED.


5 V.

6 CONCLUSION

7 The parties' cross-motions for summary judgment and/or summary  
8 adjudication are GRANTED in part and DENIED in part as consistent  
9 with this order.<sup>25</sup>

10 IT IS SO ORDERED.

11 DATED: June 16, 2006.

12   
13 LAWRENCE K. KARLTON  
14 SENIOR JUDGE  
15 UNITED STATES DISTRICT COURT  
16  
17  
18  
19  
20  
21  
22

---

23 <sup>25</sup> Plaintiff requests from the court statutory damages in  
24 the amount of \$8,000.00 pursuant to the Unruh Act. See Pl.'s  
25 Cross-Mot. and Opp'n at 7. However, because there remain disputed  
26 facts as to the ADA violations upon which plaintiff predicates his  
Unruh Act claims, it is inappropriate at this time to determine the  
award of damages.